Newman *v.* Anderton, 2 B. & P. N. R. 224; Fenn *v.* Grafton, 2 Bing. N. C. 617; S. C., 3 Scott, 56; Monks *v.* Dykes, 4 M. & W. 567; Swain *v.* Mizner, 8 Gray, 182. But in such a case, as observed by this court in Swain *v.* Mizner, he is 'a housekeeper, and not a lodger only.' In Monks *v.* Dykes, it was held that a lodger, occupying one room in a house, the woman who owned the house residing therein and keeping the key of the outer door, had no such occupation of the room that he could maintain trespass against a stranger intruding into the room; and Baron Parke said: 'I think that neither in law nor in common sense can a man be described as being in possession of a dwelling house, when he is a mere lodger.'" White *v.* Maynard, 111 Mass. 250, 254.

While the construction of the term undertenant, as used in that section of the Code prescribing on what goods distress may be levied, was not involved in the present case, it would seem that the decision of the court is sufficiently broad to cover all cases where the relation of a boarder or lodger to the landlord is in question; and it seems clear that before the goods of a boarder or lodger can become liable for rent due by the original lessee there must be some specific demise or lease granting an interest in the real estate greater than the mere right acquired by an ordinary boarder or lodger.

HOSPITAL OF ST. VINCENT OF PAUL IN CITY OF NORFOLK *v.* THOMPSON.

March 12, 1914.

[81 S. E. 13.]

1. **Charities (§ 45*)—Condition and Use of Buildings—Care as to Licensees.**—A person who accompanied a sick friend to a hospital was not a mere licensee upon the premises, and the hospital was bound to use ordinary care to have its premises in a reasonably safe condition.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. § 45.*]

2. **Charities (§ 1*)—Character of Beneficiaries.**—That a hospital received compensation from patients who were able to pay for the accommodations did not render it any the less a charitable institution.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. **Charities (§ 45*)—Liability for Torts.**—A beneficiary of a charity cannot hold the association liable for negligent injuries, not on the ground of public policy or diversion of trust funds, but because

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

one accepting the benefit of a charity enters into a relationship which exempts his benefactor from such liability.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. § 45.*]

4. Charities (§ 45*)—Liability for Torts.—Where plaintiff accompanied a sick friend to a hospital, a charitable institution, and was injured by falling into an elevator shaft negligently left unprotected by defendant, she could recover, since she was not a beneficiary of the charity, but a stranger; a charitable institution not being exempt from torts against strangers because it holds its property in trust to be applied to the purposes of charity.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. § 45.*]

5. Charities (§ 45*)—Actions for Injury—Question for Jury.—In an action for an injury to plaintiff, who had accompanied a sick friend to a hospital, caused by her falling into an elevator shaft, evidence held to make a proper case for the jury.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. § 45.*]

Appeal from Law and Chancery Court of Norfolk.

Action for personal injuries by Mrs. Thompsón against the Hospital of St. Vincent of Paul in the City of Norfolk. From a judgment for plaintiff, defendant appeals. Affirmed.

Burrow & Spindle and *Jas. E. Heath, Jr.*, all of Norfolk, for plaintiff in error.

E. R. F. Wells, of Norfolk, for defendant in error.

KEITH, P. This was a suit brought by Mrs. Thompson against the Hospital of St. Vincent of Paul, in the city of Norfolk, to recover damages for an injury alleged to have resulted from the negligence of the defendant. There was a verdict and judgment in favor of the plaintiff for $2,500, to which a writ of error was awarded.

Three errors are assigned to the rulings of the trial court: First, the action of the court in overruling the demurrer to the declaration; second, its refusal to give certain instructions asked for by plaintiff in error, and the giving of certain instructions asked for by defendant in error; and, third, its refusal to set aside the verdict and entering judgment thereon.

There are several grounds of demurrer assigned, which present no question of novelty or importance, and the underlying principles of which will be sufficiently discussed in the succeeding part of this opinion. Suffice it now to say that the declara-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

tion, in our judgment, states a cause of action, and the demurrer was therefore properly overruled.

It is assigned as error that the court refused instructions 1 and 3, asked for by the plaintiff in error, and gave instruction 4, asked for by the defendant in error.

Instruction No. 1, asked for by plaintiff in error and refused by the court, declares that a hospital which is incorporated for taking care of sick and disabled persons who may be received by it, which has no capital stock, and is not conducted for dividends or profits, is a charitable institution; and, if the jury believe from the evidence that the defendant is a charitable institution according to this definition, it cannot be held liable for the plaintiff's injury merely because its employees' negligence may have caused said injury, but that, before they can bring in a verdict for the plaintiff, they must further find that the defendant was guilty of negligence in selecting said employees.

The third instruction asked for by the plaintiff in error and refused tells the jury that "if they believe from the evidence that the plaintiff in this case came upon the premises of the defendant on the 31st day of July, 1912, at the time of the injury complained of, without an invitation, either express or implied, from the said defendant, then the said plaintiff was a mere licensee, and the said defendant was liable to her, if injured upon said premises, for wanton injury only, and they must find for the defendant, unless they further believe that the said plaintiff was wantonly injured while on the premises of the said defendant."

[1] Taking up these instructions in their inverse order, and dealing first with the principle announced in the third instruction, we are of opinion that it was rightly rejected. It appears from the declaration and from the proof—indeed, all of the evidence tends to establish—that the defendant in error was an invitee, and not a mere licensee, to whom the plaintiff in error owed the duty of reasonable care. The law is correctly and, we think, sufficiently stated upon this branch of the case in instruction No. 2, given at the instance of defendant in error, as follows:

"The court instructs the jury that, if they believe from the evidence that the plaintiff on July 31, 1912, accompanied at her request a sick friend to the defendant's hospital for treatment, that the condition of her friend was such as to render it reasonably necessary for the plaintiff, or some one else, to accompany her, then the defendant owed to the plaintiff the duty to exercise ordinary care to have its premises in reasonably safe condition for the visit; and, if the defendant negligently failed to perform that duty, and, as the proximate con-

sequence thereof, the plaintiff, while exercising due care, was injured, then the defendant is liable for the injuries sustained."

There is no dispute as to the facts on which this instruction is predicated, and the facts being ascertained, it was the duty of the court to tell the jury the law which applied to them; and this, as we have said, is correctly done in defendant in error's instruction No. 2.

[2] Instruction No. 1, asked for by plaintiff in error, presents a question of great interest. It must be conceded that the plaintiff in error is a charitable institution. That it receives compensation from patients who are able to pay for the accommodations received does not render it any the less a charitable institution in the eye of the law. This seems to be well established by the authorities. McDonald *v.* Mass. Gen'l Hospital, 120 Mass. 432, 21 Am. Rep. 529; Glavin *v.* Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

[3] It may also be conceded that, by the weight of authority, a beneficiary of the charity cannot hold the association responsible for negligent injuries, but the basis upon which the immunity is made to rest differs widely in the adjudicated cases. This court has never heretofore been called upon to consider this subject.

In Trevett *v.* Prison Association, 98 Va. 332, 36 S. E. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727, Trevett, who was a stranger to the association, obtained an injunction against it for polluting a stream which passed through his premises, upon the ground that it had created a nuisance. The association undertook to maintain that it was a public corporation, and relied upon the authority of Maia's Adm'r *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577, a corporation which was held to be purely of a governmental character and under the exclusive ownership and control of the state, and was therefore not liable in damages for the negligent acts of its servants. It was held that the Prison Association could not plead immunity upon this ground; that it was not a public corporation, and, though of a benevolent character, was responsible for its torts.

The subject has, however, been considered and treated with great learning and ability by numerous courts.

In Duncan *v.* Nebraska Sanitarium, 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N S) 973, Ann. Cas. 1913E, 1127, the Supreme Court of Nebraska held that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses; that a charitable hospital does not, by accepting compensation from a patient who is able to pay for room, board, and care, incur liability to such patient for the negligence of nurses. It

will be observed that in this case the hospital accepted compensation from a patient who was able to pay, and, notwithstanding this fact, the court charged the jury, that "the undisputed evidence further shows that the defendant is a charitable institution maintained for philanthropic and charitable and benevolent purposes, and in no manner, directly or indirectly, for private profit or dividend-paying to any one;" and the appellate court held that this instruction was fully justified by the evidence and was properly given. In the course of its opinion, the court said: "It is a well-established doctrine that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses. Some courts say that one accepting the benefits of such a charity exempts his benefactor from liability for the negligent acts of servants. Others assert that nonliability is based on the ground that trust funds created for benevolent purposes should not be diverted therefrom to pay damages arising from the torts of servants. Exemptions from liability is frequently sanctioned on the ground that public policy encourages the support and maintenance of charitable institutions and protects their funds from the maw of litigation. While there is a diversity of opinion as to the reasons for the rule, the doctrine itself is firmly established."

The appellate court said, further in its opinion, that, even though full compensation had been paid in the particular case by the plaintiff, it would not necessarily follow that the patient received no benefit from charity. "She occupied a room in a building maintained in part at least by donated funds intended for benevolent purposes. Necessary care, skill, and food came from the same source. On the record as made the jury should not have been permitted to find that the inmate had received no benefit from charity." For these propositions a great number of authorities are cited, which fully warrant the statement that we have made, that the fact that compensation was paid in the case before us does not alter the fact that the association was a benevolent institution.

While it may not be necessary in this case for us to decide, we have little hesitation in saying that what is known as the trust fund doctrine does not appeal to us as a satisfactory footing upon which to rest the immunity of such associations. The trust fund doctrine would establish absolute immunity, if carried to its logical conclusion, for all torts committed by such associations. It would apply to the omission to perform, or the negligent performance of, nonassignable duties, and, indeed, to negligence in all its conceivable forms. The immunity flowing from the acceptance of the benefits of such a charity, as held by decisions of many courts, rests upon a more logical founda-

tion, and has met with approval of many courts of high standing, and the trend of modern decision seems to be in that direction.

In Basabo *v.* Salvation Army, 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144, the subject was examined with the utmost care, and a vast number of authorities cited and considered. It discusses every phase of the case and every ground of exemption from liability that has been suggested. In the course of the opinion, Judge Parkhurst observes: "Some of the cases cited absolutely deny the liability of a charitable corporation in any event to pay damages for injuries arising from the negligence of its servants or agents, either to a patient or inmate or to a third party, on the ground of public policy, saying that * * * 'it would be against all law and all equity to take those trust funds, so contributed for a special charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants' of the charity, and arguing that, if such damages were to be allowed to be paid out of the trust funds, it would tend to destroy the charity, and to discourage the giving of money or other property for the establishment of charities. (Citing a number of authorities.) Other cases cited, while arguing along the same general lines of public policy, limit the exemption of charitable corporations from liability for injuries occasioned by the negligence of physicians, surgeons, nurses, servants, and agents to cases where there has been no negligence on the part of the defendants in the selection or retention of such persons. (Again citing authorities.) We think these latter cases must be regarded as entirely inconsistent with the general proposition of the exemption of charitable corporations on grounds of public policy, set forth in the previous cases, as was said in reference to many of these cases by Gaynor, J., in Kellogg *v.* Church Charity Foundation, 128 App. Div. 214, at page 217, 112 N. Y. Supp. 566, at page 569: 'In many, if not most, of the cases, a ground for the nonliability for the torts of agents or servants of charitable institutions is that to pay damages for such torts would be a diversion of their funds from the trust purposes for which they are donated by the charitable, and thus a contravention of the trust; and that, as such institutions have no other funds, it would be futile to allow judgments to be taken against them in such cases. But the opinions of the judges in these same cases almost invariably except cases where the agent or servant was incompetent and there was negligence in his selection, failing to take note that it would be as much a diversion of the trust funds to pay damages for the tort of negligence in selection as for any other tort. If the rule exists, it must necessarily apply to all torts and in all cases. The only support for the ar-

gument that it does exist is found in the remarks of judges in certain rather old English cases, * * * and never had a direct application to actions of tort against charitable corporations such as are now common.'"

Referring to Powers *v.* Massachusetts Homœopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, Judge Parkhurst says: "After a very careful review of the authorities up to the date of decision (1901), the United States Circuit Court of Appeals repudiated the doctrine of general exemption on the ground of public policy, and placed the exemption of the defendant in the case at bar, where it was sued for negligence of a nurse by a patient injured, upon the ground that 'one who accepts the benefit either of a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. * * * If, in their dealings with their property appropriated to charity, they [charitable institutions] create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have not been carefully selected."

In Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 33 Atl. 595, 31 L. R. A. 224, the same doctrine was maintained; and in Downes *v.* Harper Hospital, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427, it is said: "It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition."

Basabo *v.* Salvation Army, and the authorities there cited, seem to go far to establish that, with respect to the physicians, surgeons, and nurses, and other skilled attendants such as are furnished the patients, not being under the control of the corporation as to their treatment, are not to be considered as the servants of the corporation in such sense as to make it responsible under the doctrine of respondeat superior, provided they are selected with due care, and upon this principle many of the cases relating to immunity of benevolent corporations may be logically and properly rested. Secondly, that there are certain duties to patients which are corporate duties, such as the exercise of due care in the selection of skilled and competent attendants, and the exercise of due care in the summoning of

such attendants in a case where the condition of the patient requires such service, and that the agent of the corporation, whose duty it is to summon such attendants, is in such case the agent and representative of the corporation, whose negligence is deemed to be that of the corporation itself. Thirdly, that the doctrine of the general immunity of a charitable corporation from liability for damages, on the ground of public policy, as involving the diversion of trust funds from the purposes of the trust, has no logical foundation, and that, where such a corporation has funds available for the general purposes of the corporation, it may apply such funds to pay damages for which it is held liable, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them.

The case of Basabo *v.* Salvation Army, then goes on to deal with the negligence of servants or agents of benevolent institutions resulting in injuries to third persons who are not in the relation of inmates, patients, or beneficiaries. The case of Fire Ins. Patrol *v.* Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745, is said to stand almost alone in declaring immunity to a benevolent corporation for injuries inflicted upon a stranger.

In Hewett *v.* Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496, a nurse in the employment of the defendant, a charitable corporation, who was receiving wages and instruction in consideration of her services as such nurse, was placed by the superintendant in charge of a patient suffering from diphtheria, of which the superintendant had notice, but neglected to give notice to the nurse. The nurse, not knowing the nature of the case, took the disease, and, for the injury to her caused thereby, brought suit. She was held entitled to recover. Exemption from liability was claimed by the defendant on the same grounds of exemption as set forth in many of the cases above cited. After examining the statutes of New Hampshire, under which the defendant was incorporated, and finding therein no express exemption from liability, the court proceeds to a careful examination of the cases holding such corporations exempt from liability on general grounds of public policy, and the court finds from the evidence that the plaintiff was a servant or employee of the defendant corporation. In stating its conclusions upon this branch of the case, the court says as follows: "If she had been employed by an individual to attend a member of his family afflicted with smallpox, of which he had knowledge, but of which he did not inform her, and she took the disease without fault on her part and suffered damage therefrom, it would not be seriously denied that he was guilty of actionable negligence in not inform-

ing her of the danger to which he exposed her. It was his duty, arising from his employment of her, or from the contractual relation of master and servant existing between them, to warn her of the danger incident to the service which he knew, or, under the circumstances, ought to have known, and of which he knew she was ignorant, though in the exercise of ordinary care. And this duty is a nondelegable one. * * * To say that a similar duty was not imposed upon the defendant for the benefit and protection of the plaintiff, because it is a charitable corporation, is to relieve such corporations from the reasonable obligation of exercising the care ordinarily required of, or contractually assumed by, men in general in the prosecution of their legitimate business. The necessity for such an exceptional holding is not apparent. Since the property of the defendant is held for the general purpose of maintaining a hospital without other specific limitation, it is no more exempt from being appropriated to the payment of damages occasioned by the negligence of the hospital than is the property of an individual, which he holds for commercial or charitable purposes, for the consequences of his negligence."

In Bruce *v.* Central M. E. Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150, the court found that the defendant was a charitable corporation, and proceeded to examine the doctrine of the exemption of such charitable corporations from liability for negligence. In this case plaintiff was an employee of a contractor engaged in decorating the church building, and sued for injuries sustained by reason of the breaking of defective scaffolding furnished by the agents of the defendant. The majority opinion, after setting forth the reasons for holding the defendant to be a charitable corporation, proceeds to the examination of the case of Downes *v.* Harper Hospital, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427, where some of the language used was consistent with the doctrine of general exemption on grounds of public policy, and says as follows: "I conclude, therefore, that we cannot hold the principle of the decision in Downes *v.* Harper Hospital, supra, inapplicable, upon the ground that the funds of the church are not charitable trust funds. This leads us to the inquiry: Is there any other ground upon which we should hold Downes *v.* Harper Hospital inapplicable? There is this distinction between Downes *v.* Harper Hospital and this case, viz, in the Downes Case plaintiff was a patient in defendant's hospital, and therefo e a beneficiary of the charitable trust administered by the hospital corporation, while in this case he was an employee of the defendant's contractor, and not a beneficiary of the trust administered by defendant. If we hold that the principle of the Downes Case applies to the case of

bar, we must declare that that principle exempts a corporation administering a charitable trust from all liability for the torts of its agents, and, as a corporation can act only by and through its agents, that it is exempt from all liability whatsoever for torts. What is the principle underlying the Downes Case? Does it exempt a corporation administering a charitable trust from all liability for torts? Those who answer this question in the affirmative cannot support their position by appealing to the reasoning of the opinion in that case. While that opinion says, 'The law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution,' the pith of its reasoning, in my judgment, is contained in the following words: 'It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damages to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.'" And, after referring to a large number of cases, the Michigan court, in Bruce *v.* Church, said: "In the latest of these cases (Powers *v.* Homœopathic Hospital) the opinion is exhaustive and elaborate, and discusses nearly all the authorities. It is held that the ground upon which liability is denied is that of assumed risk; the court saying: 'One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity, at any rate if the benefactor has used due care in selecting those servants.'"

Coming to deal with exemption upon the ground of public policy, in Basabo *v.* Salvation Army, quoting from Powers *v.* Homœopathic Hospital, it is said that such exemption "must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty, as judges, to apply the law. We have no authority to create exemptions or to declare immunity."

In 147 Mich. at page 255, 110 N. W. at page 954 (10 L. R. A. [N. S.] 74, 11 Ann. Cas. 150) the opinion says: "I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot, therefore, claim exemp-

tion from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such a tort, and that Downes *v.* Harper Hospital and other similar cases are consistent with this rule. They rest upon the principle, correctly stated in Powers *v.* Massachusetts Homœopathic Hospital, 65 L. R. A. 372, that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in Powers *v.* Massachusetts Homœopathic Hospital. The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation."

In Hordern *v.* Salvation Army, 189 N. Y. 233, 92 N. E. 626, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889, the action was brought to recover for personal injuries sustained by the plaintiff, a journeyman mechanic, who was engaged in making repairs upon a boiler upon defendant's premises, through the defective condition of a runaway or staging leading from a door in the boiler room. The defendant claimed exemption from liability as being a religious or charitable corporation. The court cites many of the cases above referred to where such corporations have been held to be totally immune from liability, as well as those where they have been held immune on the ground that they were performing governmental functions, and also those where the immunity is made dependent upon the relation the plaintiff bears to the defendant, and says: "In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state" (citing cases)—and, after discussing certain other cases in New York, where defendant charitable corporations have been held liable to third persons for negligence, repudiates the doctrine of the nonliability of trust funds for payment of damages arising from negligence.

Hordern *v.* Salvation Army fully approves the doctrine of Powers *v.* Homœopathic Hospital, supra, and the court said: "We can add nothing to the force of this reasoning, but simply express our concurrence therein, as well as in the argument of Judge Lowell." Hordern *v.* Salvation Army itself was subsequently approved by the New York Court of Appeals in Kellogg *v.* Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883, where the court says: "It must now be regarded as settled that a charitable corporation is not exempt from liability for a tort against a stranger because of the fact that it holds its property in trust to be applied to the purposes of charity."

We are much indebted, in considering this case, to the very learned and able opinion of the Rhode Island court in Basabo *v.* Salvation Army, supra, from which we have extracted with great freedom.

[4] Applying the principles considered to the case before us, it becomes at once apparent that the defendant in error was not a beneficiary of the charity, but that she is to be considered as a stranger, and comes within the influence of the principle that a charitable corporation is not exempt from liability for torts against strangers because it holds its property in trust to be applied to the purposes of charity; a principle which seems to be fully established by courts of the highest authority and in well-considered cases.

In this connection, it may be observed that much that has been said in this opinion was, in this view of the case, unnecessary; to which we reply that the whole subject was discussed in oral argument and in the briefs of counsel; that it is of great interest and of first impression in this state; and we felt therefore that it would be well to consider it in all its bearings.

Our conclusion is that there was no error in the instructions given or refused.

[5] Coming to the facts of the case, we find from the evidence that they are fairly stated in the brief for defendant in error as follows: That Mrs. Davis was expecting to be confined, and her husband had made arrangements with the hospital to receive her as a pay patient. On the day in question Mr. Davis was out of the city, but, before leaving, had requested Mrs. Thompson, a friend of his wife, to look out for her and to go to the hospital with her, if necessary to go before his return to the city. About noon on July 31, 1912, Mrs. Thompson received a phone message from Mrs. Davis, telling her that she felt ill, and that she was preparing to go to the hospital, and asking her to come down and go with her. Mrs. Thompson complied with this request, and went to the apartment occupied by Mrs. Davis. She phoned to Mrs. Davis' physician, and he told her to order a carriage and proceed with Mrs. Davis to St. Vincent's Hospital. Mrs. Thompson ordered a carriage, and in the meantime Mrs. Davis phoned to St. Vincent's Hospital, and advised the authorities that she would come over in a short time, and asked them if they were prepared for her. She was informed that the hospital authorities were in waiting and in readiness for her arrival. About half past 1 o'clock in the afternoon Mrs. Davis and her friend Mrs. Thompson went in the carriage to St. Vincent's Hospital. Before they arrived, a storm came up, and it began to rain rapidly. The driver, who was familiar with the hospital and its entrances, drove around to the rear of the hospital into an open

court, and stopped his carriage at the entrance which was used by the hospital for its patients and friends accompanying them. Mrs. Davis was at the time suffering a great deal. At her request the driver got down from his seat, and rang the bell at the entrance, and then got back on his seat on the carriage. No one having responded to the summons, Mrs. Thompson suggested that she should get out of the carriage so that there would be no delay when the nurse came. This she did, and, as it was raining very hard at that time, she approached the entrance for the purpose of going inside of the hospital, and thereby protecting herself from the rain until the nurse came. She walked up to the entrance, which was equipped with double screen doors, and, opening the door to the left, she stepped into what she thought was a hall or reception room, but instead of that it was an elevator shaft, and she fell to the bottom of the shaft, a distance of four feet seven inches, and sustained the injuries for which she later on instituted this action.

Coming to a more particular description of the elevator, it appears that one side of the elevator shaft was an outside rear wall of the building. At the level of the ground a doorway was cut into this shaft, so that when the floor of the elevator was on a level with the surface of the ground, people could walk in and out of the elevator. This doorway was fitted up as an entrance. There was a stone doorsill at the bottom, and at the top of the doorway there was a stone lintel. There were two wooden doors which opened outwardly, and were fastened back during the summer. There were also two screen doors which opened outwardly, and which were in use in the summer months. One of these screen doors, the one to the left of a person approaching the entrance, was equipped with a handle, so that it could be opened from the outside, but there was no inside fastening on this door at all, and when the elevator was further up in the shaft there was nothing to prevent any one from opening these doors and walking into the shaft. The lower part of these screen doors was covered with a grating, which prevented a person approaching from seeing through it into the shaft beyond. On the left-hand side of the screen doors there was a push bell, just as at any ordinary entrance door, and there was a little inclined wooden way leading up to the sill of the door. In other words, the testimony seems to show that this entrance was equipped just as any ordinary entrance into a hall or reception room is equipped. There were no signs or warnings of any kind to indicate that these doors opened into an elevator shaft instead of into a hall.

We think the evidence tends to support all the averments of the declaration and all the facts upon which the several instructions were predicated, and makes a case which was proper for

the consideration of the jury, whose verdict, under proper instructions, is conclusive.

We are therefore of opinion that the trial court committed no error, and its judgment is affirmed.

Affirmed.

CARDWELL, J., absent.

Note.

While the court has not directly overruled Trevett *v.* Prisoner Ass'n, 98 Va. 332, 36 S. E. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727, we must, however, consider its doctrine repudiated. The decision in that case is based solely upon the ground that a purely charitable corporation, not controlled by the state, stands upon the same footing, with respect to its liability for torts, as an ordinary business corporation. That the result reached in that case is correct, but that the decision could have been rested upon another and better ground—invasion of private property—is pointed out in a note to that case in 6 Va. Law Reg. 157.

However, from now on, we must consider the instant case as the authority governing the liability of purely charitable corporations for acts of negligence.

At the present time, therefore, the law in Virginia is: (1) "A charitable corporation is not exempt from liability for torts against strangers because it holds its property in trust to be applied to the purposes of charity." (2) "A beneficiary of the charity cannot hold the association responsible for negligent injuries."

In the instant case, the court has repudiated what is known as the "trust fund doctrine" and places, "the immunity flowing from the acceptance of the benefits of such a charity * * * upon a more logical foundation," i. e., the beneficiary enters into a relation whereby he assumes the risk of such torts.

The basis upon which the immunity is made to rest differs widely in the adjudicated cases as President Keith observes. In Fordyce *v.* Woman's Christian National Library Ass'n, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485, it is said: "The authority on the subject of liability of charities for the negligence of agents or employees are extremely divergent. There are at least four classes of cases: (1) Cases holding that the property of a charity cannot be sold under execution * * * (2) Cases construing charities unfavorably, and assimulating them to private corporations organized for profit * * * (3) Cases holding that trustees of a charity though not answerable for the negligence of its agents, were liable for want of ordinary care in their selection. This seems to be a compromise between two irreconcilable principles. * * * (4) Cases holding that on a judgment against a charitable organization the grounds and buildings of the defendant cannot be sold under execution, but that any of its appropriated funds may be applied to the satisfaction of the judgment." In Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224, it is held: "A charitable corporation like the defendant * * * is not liable, on the ground of public policy, for injuries caused by personal wrongful neglect in the performance of its duty by a servant whom it has selected with due care." However, the "trust fund doctrine" is the usual ground for denying the liability of such institutions. Parks *v.* Northwestern University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A., N. S., 556; Downes *v* Harper Hospital, 101 Mich. 555, 45 Am. St. Rep. 427, 60

N. W. 42, 25 L. R. A. 602; Gable *v.* Sisters of St. Francis, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087; Fordyce *v.* Woman's N. L. Ass'n, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485. "It seems to have been thought, that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, and justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequence of their own misconduct, and the real object of the charity would be defeated. * * * Damages are to be paid from the pocket of the wrongdoer, not from a trust fund. A doctrine so strange as the court below has laid down in the present case ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it." Feofees of Herriott's Hospital *v.* Ross, 12 C. & F. 507, 8 Eng. Rep. 1508.

While the court has confined itself mainly to destroying the "trust fund doctrine" yet so firmly is it impressed with the reasoning of the rule laid down in Powers *v.* Massachusetts Homœpathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372—that the beneficiary of such charitable trusts enters into a relation whereby he assumes the risks of such torts—that we may assume that all of the other divergent reasons upon which the immunity has been based are likewise repudiated. Therefore, in the future, after the fact of a charity is stablished, the question will be, whether the injured party stands in the relation of a "stranger" or a "beneficiary" to the charity.

The following classes of persons have recovered against charities, and may be classed as "strangers" though the courts have seldom drawn the distinction between "strangers" and "beneficiaries:"

Servants of independent contractors engaged in repairing the property of the charity. Bruce *v.* Central M. E. Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.), 74, 11 Ann. Cas. 150; Gartland *v.* New York Zoölogical Society, 135 App. Div. 163, 120 N. Y. Supp. 24.

Servants or employees of the charity itself. McInerny *v.* St. Luke's Hospital Ass'n, 122 Minn. 141 N. W. 837, 839; Hewett *v.* Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496; Armendarez *v.* Hotel Dieu (Tex. Civ. App.), 145 S. W. 1030. But see Whittaker *v.* St. Luke's Hospital, 137 Mo. App. 116, 117 S. W. 1189 (where it was held that public interest would be best subserved by applying the doctrine of immunity rather than to allow charitable funds to be diverted).

The public generally. Kellogg *v.* Church Charity Foundation, 128 App. Div. 214, 112 N. Y. Supp. 566 (injury to pedestrian through negligence of driver of an ambulance); Rector, etc., of Church of Asception *v.* Buckhart, 3 Hill 193 (injury due to falling of church wall); Blachinska *v.* Howard Mission, 56 Hun 522, 9 N. Y. Supp. 679 (injury due to defective vault under sidewalk). But see Benton *v.* City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836, where it was held that a hospital was not liable for injuries to a person who had entered a building upon an implied invitation to arrange for the removal of a relation.

While the courts are practically unanimous in holding a charitable institution not liable for injuries to beneficiaries, the doctrine of Powers *v.* Massachusetts Homœpathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, is usually not applied but the "trust

fund doctrine," or one of the many other divergent reasons are cited. However, we may consider the following classes of persons as "beneficiaries:"

Students of charitable institutions of learning. Hill *v.* President & Trustees of Tualatin Academy & Pacific University, 61 Ore. 190, 121 Pac. 901; Parks *v.* Northwest University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556; Currier *v.* Dartmouth College, 105 Fed. 886, affirmed, 117 Fed. 44, 54 C. C. A. 430; Abston *v.* Waldon Academy, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179.

Patients of hospitals. Hearnes *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; Pepke *v.* Grace Hospital, 130 Mich. 493, 90 N. W. 278; Murtaugh *v.* St. Louis, 44 Mo. 479; Joel *v.* Woman's Hospital, 89 Hun 73, 35 N. Y. Supp. 37; Van Tassell *v.* Manhattan Eye, etc., Hospital, 60 Hun 585, 15 N. Y. Supp. 620; Ward *v.* St. Vincent's Hospital, 78 App. Div. 317, 79 N. Y. Supp. 1004; Downes *v.* Harper Hospital, 101 Mich. 555, 45 Am. St. Rep. 427, 60 N. W. 42, 25 L. R. A. 602.

Inmates of working girls' homes. Thornton *v.* Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A., N. S., 486.

Among the older cases, it would seem that the great weight of authority is that purely charitable institutions are immune from liability for acts of negligence—not amounting to an invasion of private property—without regard to whether the injured person is a "stranger" or a "beneficiary;" but, unquestionably, the instant case is in accordance with the trend of modern decision, in well-considered cases.